

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

Original & Affidavit of Mailing

77-1121

To be argued by
ZACHARY W. CARTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1121

UNITED STATES OF AMERICA,

Appellee,

—against—

GLEN THOMAS BEVERLY and
FAON DE JESUS RODRIGUEZ,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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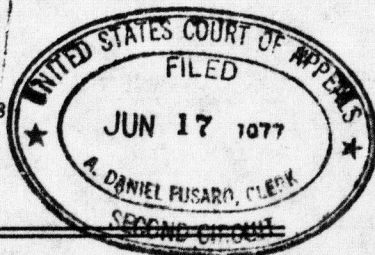




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—against—

GLEN THOMAS BEVERLY and
FAON DE JESUS RODRIGUEZ,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Glen Thomas Beverly and Faon De Jesus Rodriguez appeal from judgments entered on March 2, 1977, in the United States District Court for the Eastern District of New York (George C. Pratt, J.) convicting them, after a jury trial, of violations of the federal narcotics laws. Appellants were charged in a five count indictment with conspiring to distribute and possess with intent to distribute cocaine, between November, 1975 and March, 1976, in violation of Title 21, United States Code, Section 846 (Count One), and with the substantive offenses of distributing and possessing with intent to distribute cocaine on November 4, 1975 (Counts Two and Three) and on March 3, 1976 (Counts Four and Five), in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2.

Beverly was convicted of the conspiracy and the March 3rd distribution and possession with intent to distribute (Counts One, Four and Five), and was acquitted of the November 4th distribution and possession with intent to distribute (Counts Two and Three). Rodriguez was convicted of the conspiracy and was acquitted of the four substantive counts.

Beverly was initially sentenced to treatment and supervision under the Youth Corrections Act, Title 18, United States Code, Section 5010(b), on each count, to run concurrently, and to a special parole term of three years. Rodriguez was also sentenced to treatment and supervision under the Youth Corrections Act and to a three year special parole term. However, an order filed on April 20, 1977, Judge Pratt vacated as to Beverly that portion of sentence which added a special parole term of three years.

The execution of the sentences of both appellants was stayed pending appeal.

Appellants do not challenge the sufficiency of the evidence, but raise several claims of error. Beverly contends that the trial judge erred when he declined to charge the jury on the lesser-included offense of simple possession, Title 21, United States Code, Section 844, and on entrapment. Beverly also contends that the court's charge respecting accomplice and informant testimony was heavily weighted against the defense. Lastly, Beverly argues that his conviction under Count Four merges with his conviction under Count Five.

Rodriguez also urges that the trial court should have charged the jury on the lesser-included offense of simple possession. In addition, he contends that the failure of the jury to follow the instructions of the court yielded

an inconsistent verdict and requires reversal, and that it was error for the trial court to impose a special parole term of three years under 18 U.S.C. § 5010(b) of the Youth Correction Act.¹

Statement of Facts

A. The Government's Case

The Government's case was presented through four witnesses. The first was Robert Goncieski, an individual named as a co-conspirator in the indictment, who, on November 4, 1975, sold to an undercover agent the cocaine which was the subject of Counts Two and Three of the indictment. The second was Special Agent Michael Kane of the Drug Enforcement Administration, who purchased cocaine from Goncieski on November 4, 1975, arrested Goncieski in February, 1976, and who, in conjunction with Goncieski, arranged to obtain from Beverly and Rodriguez on March 3, 1976 the cocaine which was the subject of Counts Four and Five. The third was Special Agent Michael Pavlick who surveilled, arrested, searched, and questioned Beverly on March 3, 1976. The last witness was Special Agent Heather Campbell who seized and searched Beverly's van following his arrest on March 3, 1976. From their collective contributions, the following facts emerged.

¹ Judge Pratt's order vacating the special parole term of appellant Beverly is attached as an appendix to this brief. In light of the fact that appellant Beverly's sentence has already been corrected, we suggest that the Court simply remand appellant Rodriguez's case to the district court for the limited purpose of having his special parole term similarly vacated. The issue presented by Point I of Rodriguez's brief thus need not be discussed further.

As of the fall of 1975, Robert Guncieski had known Glenn Beverly for some six years (1.48).² During the course of their friendship, Guncieski, who had used all manner of drugs since he was fifteen years old, obtained quantities of marijuana from Beverly for sale to third persons (1.96). During the late spring or early summer of 1975, Guncieski learned through mutual acquaintances that Beverly was dealing in cocaine (1.49). Guncieski began to purchase \$25 "spoons" of cocaine from Beverly on a regular basis for his personal use (1.50).

In September, 1975, while enrolled as a student at New York City Community College, Guncieski by chance met another student, Faon De Jesus Rodriguez. Guncieski and Rodriguez quickly discovered that they had a common acquaintance in Beverly (1.50). Indeed, Beverly married Rodriguez's sister in early 1976 (1.52). Guncieski and Rodriguez also discussed cocaine at their first meeting. Soon thereafter, Guncieski, who had lost contact with Beverly, entered into an arrangement with Rodriguez whereby Guncieski would obtain from Rodriguez quantities of cocaine, which Guncieski would in turn sell to others. This arrangement continued in effect from September, 1975, until the time of Guncieski's arrest in February, 1976, and included numerous transactions (1.54).

In early November, 1975, Guncieski was approached by a friend of his named Billy Hendricksen, who introduced Guncieski to an individual named "Mark." Mark told Guncieski that he knew a person named "Mike" who was interested in obtaining four ounces of cocaine (1.55). Guncieski advised Mark that he would ascertain whether or not such a deal was possible. Guncieski did not

² The prefixes "1", "2", and "3" which precede all page references correspond to Volumes I, II and III of the trial transcript; Volume I for December 20, 1976, Volume II for December 21, 1976, and Volume III for December 22, 1976.

realize, of course, that Mark was actually an informant for the Drug Enforcement Administration ("DEA") and that the potential customer, "Mike", was actually Special Agent Michael Kane (1.144). Indeed, Goncieski was unaware that Mark had already delivered a sample of cocaine to Special Agent Kane which he had received from Hendricksen, which Hendricksen had in turn obtained from Goncieski (1.145).

After Mark's visit, Goncieski relayed Mark's proposition to Rodriguez. Rodriguez told Goncieski that he could supply the four ounces of cocaine, providing that the arrangements were satisfactory. After some discussion the transaction was scheduled for November 4, 1975 at John F. Kennedy International Airport (1.56).

At approximately 12 o'clock noon on November 4th, both Rodriguez and Beverly came to Goncieski's house and delivered to him four ounces of cocaine. They all agreed that Goncieski would drive to the airport in one car and that Beverly and Rodriguez would follow in another, so that appellants could watch the deal (1.57).

Upon arrival at the airport, Goncieski parked his car in the TWA parking lot. Rodriguez and Beverly also parked in the lot, taking up a position somewhat behind Goncieski's vehicle (1.56-1.57).

Goncieski left his car and proceeded to the TWA terminal, where he joined Mark, Hendricksen and two associates of Hendricksen's. Within a few minutes Agent Kane arrived (1.57-1.58, 1.146-1.147). Goncieski, Kane and Mark then left the terminal and walked to the parking lot. There, Kane took Goncieski to his (Kane's) car, a blue Cadillac El Dorado, and showed Goncieski \$4800 which was contained in the trunk (1.58, 1.146). After Goncieski had counted the money, he brought Kane to his (Goncieski's) car, from which he removed the four ounces of cocaine he had received from appellants. Kane

accepted delivery of the cocaine from Goncieski, and together in Goncieski's car they drove to Kane's El Dorado. Kane paid Goncieski the \$4800, and they parted company (1.146, 1.59). Goncieski signaled Rodriguez and Beverly that the transaction was completed as he drove out of the parking lot. Rodriguez and Beverly left the lot and met Goncieski at a prearranged location near an exit off the Van Wyck Expressway. There, Goncieski, Rodriguez and Beverly divided the proceeds. Goncieski received \$300, and Beverly and Rodriguez kept the balance (1.59-1.60).

Shortly after November 4, 1975, Goncieski discussed the transaction which had taken place with Rodriguez. Rodriguez expressed concern over what he regarded as suspicious activity that he had observed as he watched the deal at J.F.K. Airport. Rodriguez noted that there were three males moving about the parking lot during the transaction.³ In the course of their conversation, Goncieski told Rodriguez that Kane had been driving a blue El Dorado on the day of the deal (1.60-1.61).

During the period of time between the November 4th transaction and Goncieski's arrest in February, 1976, Goncieski had frequent conversations with Kane regarding future transactions for cocaine (1.61, 1.149). Two weeks after the airport deal, Kane met with Goncieski and asked him whether or not his connection could supply multi-kilogram quantities of cocaine. Goncieski expressed some doubts about his ability to supply cocaine in any quantity to Kane, citing his connection's concern over what he had observed in the parking lot on November 4th. Goncieski stated, however, that his connection was a Columbian national and could supply large quantities of cocaine if he had a mind to (1.150).

³ Agent Kane testified that there were indeed three surveillance agents in the parking lot. (2.7).

Goncieski and Kane had several more discussions on subsequent occasions, but there were no further transactions. On February 24, 1976, Kane identified himself to Goncieski as a DEA Agent and arrested him (1.151).

Goncieski agreed to cooperate on the same day he was arrested. He informed Agent Kane that his sources of supply for cocaine on November 4, 1975 were Rodriguez and Beverly (1.63, 1.151). Goncieski agreed to obtain more coke from appellants at the direction and under the supervision of Agent Kane (1.64).⁴

Between February 24th and March 2nd, 1976, Goncieski negotiated with Rodriguez and Beverly for the delivery of four ounces of cocaine (1.53). Realizing that Rodriguez was particularly nervous about selling to Kane, Goncieski did not tell Rodriguez that the cocaine was to go to Kane, but said instead that the narcotics were to be sold to a mutual acquaintance named "Ralphie" (1.64-1.65). On March 2, 1976, Goncieski met with Rodriguez in Goncieski's car at the corner of Liberty Avenue and Elton Street in Brooklyn, to finalize the arrangements. Agent Kane observed this meeting (1.154).

On the morning of March 3, 1976, the day that the sale was actually to take place, Rodriguez and Beverly came to Goncieski's home where they further discussed arrangements for delivery of the cocaine to Goncieski, and the subsequent sale of it to "Ralphie". It was agreed among them that Beverly would deliver the cocaine to Goncieski, who should be waiting in his car at the inter-

⁴In return for his cooperation, Goncieski was permitted to plead guilty to the charge of using a communications facility in furtherance of the commission of a drug offense. He received a sentence of probation under the Youth Corrections Act, Title 18, United States Code, Section 5010(a).

section of Liberty Avenue and Elton Street. After the delivery was completed, Goncieski would drive to Aqueduct Raceway, followed by Beverly in one car and Rodriguez, his mother and his sister in another. Just as on November 4, 1975, Beverly and Rodriguez were to position themselves at the race track to watch the sale of the cocaine by Goncieski to "Ralphie" (1.66-1.67).

After Rodriguez and Beverly left his home, Goncieski called Agent Kane and informed him about the arrangements that had been made (1.67, 1.165). Upon receiving that information, Agent Kane directed other DEA agents to set up surveillance near the intersection of Liberty Avenue and Elton Streets and near the home of Beverly and Rodriguez, which was located at 751 Glenmore Avenue, just two blocks away from where the delivery of the cocaine was to be made. In addition, Kane provided the surveillance agents with descriptions of Beverly and Rodriguez and the vehicles they would be driving (1.155).

At approximately 1:30 p.m., Agents Kane and Burstein met Goncieski outside his home. Goncieski was directed to drive to a location a few blocks away, and the agents followed. Upon arrival at that location, Goncieski and his car were searched for contraband. None was found. Goncieski was then instructed to proceed to the intersection of Liberty Avenue and Elton Street. Upon arriving at that location, Goncieski parked his car on the right hand side of Elton Street facing Liberty Avenue. Agent Kane drove his car, the same blue El Dorado he had used on November 4, to the corner of Glenmore Avenue and Elton Street, a location south of the meeting place, where he could observe Goncieski's car (1.157).

Meanwhile, Special Agent Michael Pavlick, among others, had set up surveillance on the 751 Glenmore Ave-

nue residence. At approximately 1:45 p.m., Pavlick saw Beverly exit 751 Glenmore Avenue with a small brown bag in his hand. Beverly then entered his van, which was parked on Glenmore Avenue, and waited. A few minutes later, Rodriguez exited the residence with two females, presumably his mother and sister, and entered his automobile. At this point, both Rodriguez and Beverly gestured toward one another, and Beverly immediately drove away from that location. Rodriguez remained parked outside the 751 Glenmore Avenue residence (2.93).

Agent Pavlick followed Beverly, who traveled east along Glenmore Avenue, made a left turn onto a side street and traveled one block toward Liberty Avenue. When he reached Liberty, Beverly turned left and proceeded along Liberty Avenue until he reached Elton Street. Upon arriving at this location, Beverly slowed and pulled over, appearing to reconnoiter the location where Goncieski was parked. Beverly did not stop, however, but proceeded to make the next possible left turn and circle back toward 751 Glenmore Avenue (2.92-2.93). Upon arriving at that location, Beverly approached Rodriguez's vehicle and had a conversation with Rodriguez which lasted a little more than a minute. Beverly then returned to his van and proceeded along the same route as before, while Rodriguez again remained parked on Glenmore Avenue. This time however, Beverly turned onto Elton Street and parked behind Goncieski's car (1.157, 2.94).

After parking, Beverly exited his van and entered Goncieski's car. Beverly placed the bag of cocaine on the seat between himself and Goncieski with the comment "There was a blue El Dorado around the corner with two guys in it. I hope you know what you're doing." At that moment the El Dorado, among other cars, pulled

up and Beverly was placed under arrest. Agent Pavlick, who actually effected the arrest, pretended to place Goncieski under arrest also, in order to protect him as an informant (2.97).

Agent Pavlick immediately recovered the bag of cocaine from Goncieski's car and took custody of it along with Beverly. Pavlick also obtained the keys to Beverly's van from his person, and gave them to Special Agent Heather Campbell who took custody of the van (2.98). Agent Pavlick placed Beverly in a government vehicle and left the area. Inside the car, Pavlick gave Beverly his *Miranda* warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966). Pavlick then searched Beverly's person and found three separate packages of cocaine, along with two pieces of paper which contained writings that appeared to be drug codes (2.109-2.112). When Pavlick asked Beverly about the codes, Beverly claimed that they were merely notations which he had written down. When he was asked where he had obtained the cocaine which he delivered to Goncieski, he claimed that Goncieski, whom he thought had been arrested along with him, rather than his brother-in-law, Rodriguez, was the source (2.133). After Pavlick had expressed his disbelief at those statements and also after Beverly had asked Pavlick what benefits he could hope to secure from the Government in exchange for his cooperation, Beverly admitted that he had received the drugs from Rodriguez. He explained that he was to deliver the cocaine to Goncieski who would in turn sell it to a third person. Ultimately, the proceeds of the sale were to be shared among the participants in the transaction (2.116). During his discussion with Pavlick, Beverly asked whether he would get an opportunity to work "sort of like on 'Mod Squad,'" and Pavlick assured him that he would (2.116).

Meanwhile, Agent Campbell, who had taken custody of the van, searched it and found in the glove compart-

ment several cards which contained what appeared to be duplicate price lists for varying amounts of cocaine. Agent Campbell testified that the prices and weights corresponded to current prices for cocaine. These cards were contained in the same plastic packet as the New York State insurance card for the van (2.146-2.147).

Lastly, it was stipulated that Rodriguez was arrested while walking in a westerly direction on Glenmore Avenue. It was further stipulated that Rodriguez was a Columbian national (2.158).

The Defense Case

Glenn Beverly testified in his own behalf. He admitted that he did in fact deliver four ounces of cocaine to Goncieski on March 3, 1976, but he related a set of rather bizarre circumstances that resulted in that delivery.

Beverly claimed that at approximately 7:00 A.M. on March 3, 1976, he was awakened by a phone call from Goncieski. Goncieski, whom Beverly had thrown out of his wedding as an uninvited guest, and who had apparently laid hands on Beverly's wife, asked that Beverly drive to his home to help him out with his car which was in need of repair. Beverly, who had some automotive skills, but had only gotten to bed three hours before, agreed to answer Goncieski's plea for help, and brought his brother-in-law, Rodriguez, who apparently had no training in auto-mechanics, along with him.

When Rodriguez and Beverly arrived at Goncieski's house at around 8:00 A.M., Goncieski advised them that he had since had the car towed away. Somehow, the conversation turned suddenly toward Goncieski's efforts at getting Beverly a job as a cab driver. At this

juncture, Goncieski advised Beverly and Rodriguez that he had a problem. Goncieski said that he had been keeping cocaine in his car—the same car that was towed away just that morning. Of course, the cocaine had to be removed from the car, but he couldn't bring it into the house because his aunt, who was also his landlord, on finding marijuana in the house on a prior occasion, had threatened to call the police. Goncieski asked Beverly to hold onto the four-ounce package of cocaine, the three separate and very small containers of cocaine, and the various slips of paper containing narcotics codes and schedules of prices. Beverly, who testified that he never used cocaine, who had admonished Goncieski about dealing drugs to youngsters and who threatened to "kick his brains" out for doing it, accepted the cocaine from Goncieski because Goncieski was going to find out about a job for him (2.171). Goncieski then told Beverly to meet him at the intersection of Liberty Avenue and Elton Street later that afternoon in order to return the drugs and assorted paraphernalia. Beverly could not explain why it was necessary for him to hold those items, such as the smaller packages of cocaine and the papers, which Goncieski could have concealed on his own person (2.195).

Beverly further testified that later, after he was arrested, he stated that he had received the cocaine from Rodriguez only because the agents wouldn't believe the "truth" (2.182).

Beverly also called a character witness (2.4-2.5). Rodriguez neither testified nor called any witnesses in his behalf.

ARGUMENT

POINT I

The Trial Judge Did Not Commit Error When He Declined To Charge The Jury On The Lesser-Included Offense And On Entrapment.

Appellants raise a claim which, in light of the evidence, is both ingenious and ridiculous. At trial, appellant Beverly urged the court to charge the jury on simple possession as a lesser-included offense and to dove-tail into that charge an instruction that if the jury should find that Beverly was entrapped with regard to the simple possession, then they must acquit (2.208, Appellant's Appendix D). Appellant thereby sought to "bootstrap" his way into an acquittal by (1) ~~positing~~ an incredible version of the facts (2) securing an instruction for a lesser-included offense based upon those facts and (3) securing an instruction regarding entrapment based entirely upon those same facts. We believe that the trial judge correctly decided that neither instruction was warranted by the evidence.

It is well established that a lesser-included offense charge is only proper where there is a "disputed factual element" which would allow the jury rationally to conclude that the defendant is guilty of the lesser but not of the greater offense. *United States v. Sansone*, 380 U.S. 243 (1965). Accepting for a moment Beverly's version of the facts, there is little doubt that there was a disputed factual element (an intent to distribute) not necessary for conviction of the lesser-included offense (simple possession). However, again accepting Beverly's version of the facts, it is clear that in this case the second prong of the *Sansone* test could not be satisfied, since

conviction of the lesser-included offense, under the circumstances, was a legal impossibility.

Since Goncieski was a government agent, under Beverly's version of the facts, there was entrapment as a matter of law vis-a-vis simple possession. *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971). Therefore, the jury could not be instructed that they could find the defendant guilty of the lesser-included offense. Similarly, it would have been error to have instructed the jury on entrapment. There was no evidence to support an entrapment charge on the distribution and possession with intent to distribute charges in the indictment and, indeed, Beverly urged the entrapment charge with respect to the simple possession only. Beverly's version of the facts, and Beverly's version alone, established entrapment as a matter of law. Thus, as Judge Pratt astutely pointed out, the issue was simple: if the jury were to accept Beverly's version of the facts, they would be *obliged* to acquit. Indeed, Judge Pratt stated:

"I am willing to charge them that if they do believe Beverly, then they must acquit.

I would also charge them they would have to even if they don't believe precisely what Beverly had to say, they would have to find the elements based on other testimony, including Goncieski, beyond a reasonable doubt."

Thus, the record shows that Beverly proposed instructions which were incorrect and that when the judge offered proper instructions he refused them. Clearly, he cannot now be heard to complain. His contention is without merit.

POINT II**The Court's Instructions Regarding Informer/Accomplice Testimony And Defendant's Testimony Were Proper.**

Appellant Beverly claims that the court's instruction on accomplice and informer testimony and on the interest of the testifying defendant were heavily weighted against the defense. We disagree.

* The Court's charge on accomplice and informer testimony was as follows:⁵

Much of the testimony in this case comes from the witness Robert Guncieski, who claims to have been a co-conspirator of the defendants up until he was arrested in late February, 1976. Thus, he claims to have been what the law describes as an accomplice. And Mr. Guncieski was an accomplice of the defendants if his testimony is true.

An accomplice is one who has united with another person in a commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness simply because of his participation in the crime charged.

Now, after he was arrested, Mr. Guncieski agreed to cooperate with the Drug Enforcement Administration and became an informer. An informer is one who provides evidence against a

⁵ It should be noted that the Government witness, Guncieski, was both an accomplice and an informant, having been an actual participant in the crimes alleged from November, 1975, up until his arrest on February 24, 1976, and an informant from February 24, 1976, through the arrest of appellants on March 3, 1976. Judge Pratt charged that Guncieski was both an informant and an accomplice.

defendant in return for some personal benefit given him by the Government.

Here, you will recall Mr. Goncieski's testimony that in return for his cooperation he was permitted to plead to a lesser charge and he was promised that the extent of his cooperation would be made known to the Judge at the time of his sentencing.

If accomplices and informers could never be used on trial, of course, there would be many crimes involving real and serious guilt in which convictions could not be obtainable. Their testimony, however, must be received with great caution and given such weight as you deem it entitled to be received under all the circumstances of the entire case.

The law does not prohibit the use of an accomplice or an informer. But whether you approve of their use is not to enter into your consideration in this case. In certain types of crime the Government of necessity is frequently compelled to rely upon the testimony of accomplices, of persons with criminal records, or of informers. Otherwise, it would be difficult to detect or prosecute some wrongdoers, and this particularly is true in conspiracy cases. Often the Government has no choice in the matter. It must take the witnesses to the transaction as they find them.

The testimony of an accomplice or informer alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.

However, I reemphasize that the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an accomplice or informer unless you believe that unsupported testimony beyond a reasonable doubt (3.124-3.126).

The Court's charge on a defendant's testimony was as follows:

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

With respect to the Defendant Beverly, while the law does not require a defendant to testify, it permits him to do so on his own behalf. Obviously, a defendant has a deep personal interest as a result of his prosecution. Indeed, it is fair to say he has the greatest interest in the outcome.

Interest creates a motive for false testimony. And a defendant's interest in the result of his trial is of a character possessed by no other witness.

In appraising the credibility of the Defendant Beverly you may take that fact into consideration. However, I want to say with equal force to you, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.

It is for you to decide what extent, if at all, the defendant's interest has affected or colored his testimony in this case. (3.127-3.128).

Appellant Beverly concedes, as he must, that the court's charge on accomplice and informer testimony meets the requirements of *United States v. Swiderski*,

539 F.2d 854, 860 (2d Cir. 1976). Furthermore, it is well settled that the trial judge need not charge the jury on what amounts to an accomplice's "confessed criminality" as suggested by the language in appellant's proposed charge to the effect that "the fact that the witness committed a felony shows a defect in his character that may have made him more liable to lie on the witness stand." (Appellant's Appendix D). *United States v. Magnano*, — F.2d — Slip. Op. 5471, 5478, n.3 (2d Cir., decided September 7, 1976); *United States v. Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974); *United States v. Falange*, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); *United States v. Projansky*, 465 F.2d 123, 136, n.25 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

Similarly, the Court's charge on defendant testimony was entirely proper, and the language used has been approved by this circuit. *United States v. Scalfani*, 487 F.2d 245, 257 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973). Indeed, it was more favorable to the defense than the charge recently approved by this Court in *United States v. Martin*, 525 F.2d 703, 706 n.3 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975); see also, *United States v. Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964).

Accordingly, appellant's contentions in this regard are without merit.

POINT III**The Jury's Verdict Was Consistent With The Facts And Was Not Inconsistent With The Court's Charge On The Law.**

Appellant Rodriguez claims that the failure of the jury to follow the instructions of the court yielded an inconsistent verdict requiring reversal. Appellant concedes, as he must, that inconsistency of a verdict is not a ground for reversal, citing, among other cases, *United States v. Zane*, 495 F.2d 683 (1974). He argues, however, that where an inconsistent verdict occurs as the result of misapplying or ignoring the instructions of law, then the conviction must be reversed. Apparently, appellant has discovered no authority to support that proposition, and we submit that there is none. His reliance upon *Sealfon v. United States*, 332 U.S. 575 (1948), is misplaced, as that case is wholly inapposite to the case at bar. The *Sealfon* language, lifted out of its context by appellant, doesn't suggest guidelines for determining the consistency or inconsistency of jury verdicts, but rather, whether or not essential issues have or have not been resolved which trigger the application of double jeopardy or the doctrine of collateral estoppel.

In any event, the jury's verdict in this case was clearly not inconsistent with the facts adduced at trial. Appellant ignores the fact that the substantive offenses charged in Counts Two, Three, Four and Five of the indictment did not comprise the sum total of the overt acts committed in furtherance of the conspiracy charged in Count One, and about which evidence was received. Goncieski testified that on numerous occasions between November, 1975 and February, 1976, he had obtained cocaine from appellant Rodriguez which he in turn sold to others. Clearly, those acts were in furtherance of the conspiracy.

The paragraph of the Court's conspiracy charge which appellant isolates in support for his claim that the jury ignored the Court's instruction⁶ itself ignores the totality of the Court's conspiracy charge. The very next line following the cited paragraph states what is undoubtedly the law regarding the relationship of conspiracies to substantive offenses:

"Now, conspiracy is an offense separate and apart from any offense that may have been committed pursuant to the conspiracy." 3.112.

Turning again to the evidence in the case at bar, if the jury believed that portion of Goncieski's testimony concerning appellant Rodriguez's "surveillance" of the November 4th and March 3rd transactions, then the jury could reasonably have found, consistent with the Court's charge, that Rodriguez's participation did not rise to the level of aiding and abetting the commission of specific substantive offenses, but was of a character consistent with that of participation in a conspiracy in a manner that the Court described, especially since the court did not give a Pinkerton charge, *Pinkerton v. United States*, 328 U.S. 640 (1946).

We believe that appellant's claims on this point is without merit.

⁶ "In short, in count one of the indictment the defendants are charged with conspiracy to commit the offenses which are charged in counts two, three, four and five of the indictment." (3.112).

Judge Pratt's detailed instructions on conspiracy covered some seven pages of transcript. (3.112-3.119).

POINT IV**Appellant Beverly Convictions Under Counts Four and Five of Indictment Do Not Merge.**

Appellant contends that since his convictions under the "possession" count (Count Four) and the "distribution" count (Count Five) purportedly merge, the identical concurrent sentences the court imposed on each count following conviction should be vacated and the matter remanded for resentencing on either the "possession" or the "distribution" counts. We disagree. Because each count of the indictment requires proof of a fact the others do not, the convictions do not merge. The judgment of the district court should be affirmed.

Generally, a person may be convicted of two different crimes arising out of the same transaction as long as each crime requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932); *Perkins v. United States*, 526 F.2d 688 (5th Cir. 1976); *United States v. Cedar*, 437 F.2d 1033 (9th Cir. 1971). Under § 841(a)(1), the charge of possession with intent to distribute does not require proof of distribution, while the distribution charge does not require proof of possession. *United States v. Stevens*, 521 F.2d 334, 337 (6th Cir. 1975). Indeed, in an analogous situation involving possession and distribution of counterfeit stamps, *United States v. Cioffi*, 487 F.2d 429 (2d Cir. 1973), this Court has held that the crimes did not merge:

Although it would be rare for a seller not to have at least constructive possession, such a case is conceivable, e.g., if A, a middleman, sells B counterfeit owned by and in possession of C and the contraband is delivered directly to B by C. *Id.* at 496.

The crimes of possession of narcotics with intent to distribute and distribution are likewise separate crimes, each requiring proof of a fact that the other does not. Since proof of the one does not automatically prove the other, the convictions do not merge. *United States v. Horsley*, 519 F.2d 1264, 1265-66 (5th Cir. 1975).

The cases appellant cites in support of his claim to the contrary are plainly distinguishable. In three of them, *United States v. Stevens, supra*; *United States v. Curry*, 512 F.2d 1299, 1306 (4th Cir. 1975), and *United States v. Atkinson*, 512 F.2d 1235 (4th Cir. 1975), the courts held that where there is no evidence of possession with intent to distribute a controlled substance apart from evidence of the actual distribution, the offenses merge. Applying that standard to the present facts, the offenses are clearly distinct as there was ample independent evidence that Beverly and Rodriguez possessed the narcotics well before their actual distribution.

Prince v. United States, 352 U.S. 322 (1956), is also distinguishable. There, the defendant was charged with robbery of a federally insured bank and entry into the bank with intent to commit a felony, both in violation of Title 18, United States Code, Section 2113. Construing the Federal Bank Robbery Act, the Supreme Court held that the two crimes merged under the statute. But as the Court recognized in *Prince*, there are indeed instances where separate convictions do not merge, though they arise out of the same operative facts. 352 U.S. at 328, n. 9. See also *United States v. Meduri*, 457 F.2d 330 (2d Cir. 1972); *United States v. DeStafano*, 429 F.2d 344, 348 (2d Cir. 1970).

Finally, this Court, in *United States v. Vasquez*, 468 F.2d 565 (2d Cir. 1972), on facts close to these, refused to reach the broader issue of statutory construction and

in the exercise of its discretion affirmed convictions under the concurrent sentence doctrine for both possession of narcotics with intent to distribute and distribution. In *Vasquez*, as here, there was no spillover which could have prejudiced the defendant in any way and the defendant was sentenced to concurrent sentences well within the maximum permitted by law. Beverly's claim that the sentence on the "merged" count may have some impact on his parole eligibility is speculative, and his reliance on *United States v. Machibroda*, 338 F.2d 947 (6th Cir. 1964) is misplaced for two reasons. First of all, *Machibroda* is distinguishable on its facts since, unlike the case at bar the offenses involved, specifically, entering a bank with intent to steal and bank robbery, were offenses which clearly merged. Secondly, *Marchibroda* in making the determination that "multiplicity of sentences impairs a prisoner's opportunities for pardon or parole," relied on cases, the most recent of which is seventeen years old. *United States v. Leather*, 271 F.2d 80 (7th Cir. 1960). Beverly cites no statutory authority or administrative regulations in support of the notion that under current parole guidelines concurrent sentences for multiple offenses will result in any negative impact upon his parole eligibility. Under the circumstances, this Court should not reach the issue of statutory construction and judgment of conviction should be affirmed under the concurrent sentence doctrine.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
June 14, 1977

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
ZACHARY W. CARTER,
*Assistant United States Attorneys,
Of Counsel.*

APPENDIX

1a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 76 CR 299

UNITED STATES OF AMERICA,

—against—

GLEN BEVERLY,

Defendant.

Defendant's motion dated April 11, 1977 for a correction of sentence pursuant to FRCrP 35 is granted to the extent that the portion of the sentence adding a special parole term of three years at the expiration of custody pursuant to 18 U.S.C. § 5010(b) is vacated.

SO ORDERED.

Dated: Westbury, New York
April 13, 1977.

/s/ GEORGE C. PRATT

.....
GEORGE C. PRATT
U.S. District Judge

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of June 19 77 he served a copy of the within
and APPENDIX
BRIEF/FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

STANLEY S. ZINNER, ESQ., 404 AVENUE OF THE AMERICAS, NEW YORK,

NEW YORK 10011 and LEGAL AID SOCIETY, 509 U. S. COURTHOUSE,

FOLEY SQUARE, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
225 Cadman Plaza East
drop for mailing in the United States Court House, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

17th day of June 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979

BEST COPY AVAILABLE

